

STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

**DOCKET**

**07-AFC-6**

DATE Oct.19 2011

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In the Matter of:

The Application for Certification for the  
CARLSBAD ENERGY CENTER  
PROJECT

Docket No. 07-AFC-6

**CARLSBAD ENERGY CENTER LLC'S RESPONSE TO  
THE CITY OF CARLSBAD AND CARLSBAD REDEVELOPMENT AGENCY'S  
REQUEST TO TAKE OFFICIAL NOTICE**

October 19, 2011

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**I. INTRODUCTION**

On October 17, 2011, the City of Carlsbad and the Carlsbad Redevelopment Agency (collectively, the "City") filed a Request for Official Notice of Their Official Acts Regarding Land Use Conformance ("City's Request"). Applicant Carlsbad Energy Center LLC ("Applicant") responds herein to the City's Request.

In the Request, the City seeks official notice of the City's "official acts," specifically, Resolution 2011-230, adopted on September 27, 2011, and Ordinance CS-158, adopted on October 11, 2011. By these two "official acts," the City yet again attempts to circumvent the Warren-Alquist Act and thwart the jurisdiction of the Commission over the proposed Carlsbad Energy Center Project ("CECP").

The City's Request relates to "official acts" that are not LORS, are inapplicable to the CECP, are not relevant to the CECP Application for Certification ("AFC") proceeding, and need not be considered for purposes of issuing a Final Decision. For these reasons, the Committee should deny the City's Request.

## **II. ARGUMENT**

Commission regulations on power plant site certification provide that “[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs.” (20 Cal. Code Regs., § 1212(a).) Each party to a siting proceeding has the right to submit testimony and other evidence, subject to the exercise of the lawful discretion of the Presiding Committee Member. (20 Cal. Code Regs., § 1712(b).) The Committee may take official notice of “any generally accepted matter within the commission’s field of competence, and of any fact which may be judicially noticed by the courts of this state.” (20 Cal. Code Regs., § 1213.<sup>1</sup>)

At this late stage of the CECP siting process, the Committee need entertain only the most critical evidence. The items submitted for inclusion in the record in the City’s Request do not constitute evidence that is relevant to the CECP proceeding, nor are the “official acts” documents that the Committee should take official notice of. Here, the City seeks official notice of two “official acts” taken by the City exclusively “in response to what the City and the Redevelopment Agency consider is an incorrect interpretation of the [Presiding Member’s Proposed Decision (“PMPD”)] and in an effort to make its land use regulations more understandable.” (City’s Request at 2.) What the City fails to mention, however, is these “official acts” are yet another attempt by the City to prevent the CECP from being built within the City’s Coastal Zone.

### **A. The “Official Acts” Are Not LORS**

The Warren-Alquist Act provides the Commission with exclusive jurisdiction regarding

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<sup>1</sup> The City does not refer to section 1213 of Title 20, California Code of Regulations in its Request, nor does it explain how the “official acts” fall within the purview of section 1213. The City has thus failed to meet even the minimum requirements necessary for official notice by the Commission.

the siting, design and permitting of electric generating facilities. (Pub. Res. Code §§ 25000 *et seq.*) The Carlsbad City Council adopted Resolution 2011-230 and Ordinance CS-158 in another of its multiple attempts to defeat the CECP and circumvent the Commission's authority to certify the CECP.

Resolution 2011-230 approves and adopts various recommendations of the City of Carlsbad Planning Commission. (Resolution 2011-230 at 1-2.) For example, the Resolution adopts and approves General Plan Amendment ("GPA") 11-06 and incorporates by reference the findings in Planning Commission Resolution No. 6803, yet the City failed to include these specific items in its Request. Moreover, the Resolution adopts and approves Local Coastal Program Amendment ("LCPA") 11-06 and incorporates by reference the findings in Planning Commission Resolution No. 6805 regarding the same, but expressly notes that "approval of LCPA 11-06 shall not become effective until it is approved by the California Coastal Commission and the California Coastal Commission's approval becomes effective." (Resolution 2011-230 at 2 (emphasis added).) Without inclusion of the GPA information in the filing, and the fact that the LCPA will not go into effect unless and until the Coastal Commission approves it, it is not a LORS.

In the same vein, by the express language of the Ordinance, it does not go into effect until thirty (30) days from the date of its adoption. (Ordinance CS-158.) Further, the Ordinance expressly states that it "shall not be effective until approved by the California Coastal Commission." (*Id.*) Thus, the Ordinance is not a LORS and has no affect on the CECP AFC Proceeding.

**B. The City's "Official Acts" Are Not Relevant to the CECP AFC Proceeding**

As noted above, the Commission has exclusive jurisdiction regarding the siting, design

and permitting of electric generating facilities. Nevertheless, if the Committee determines the “official acts” submitted by the City should be considered, before taking official notice of the “official acts” the Committee must evaluate the substantive nature of the “official acts” and base its decision on whether the information contained therein is even relevant to the CECP AFC proceeding. If the Committee determines the “evidence” to be irrelevant to the CECP AFC proceeding, the Committee should deny the City’s Request. The City’s “official acts” do not, as the City claims, present a clarification of the City’s land use regulations, but are instead an attempted retroactive prohibition of the CECP at its proposed site. The biased “official acts” lend nothing to the Committee’s analysis of the CECP AFC and the CECP’s compliance with applicable LORS.

### **III. CONCLUSION**

The City’s Request is untimely, lacks good cause, is irrelevant to the CECP AFC proceeding, and does not involve new LORS. Accordingly, the City’s Request should be DENIED.

Date: October 19, 2011

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APPLICATION FOR CERTIFICATION  
FOR THE CARLSBAD ENERGY  
CENTER PROJECT

Docket No. 07-AFC-6  
PROOF OF SERVICE  
(Revised 9/19/2011)

**CARLSBAD ENERGY CENTER LLC'S  
Response to City of Carlsbad and Carlsbad Redevelopment Agency's  
Request to Take Official Notice**

**CALIFORNIA ENERGY COMMISSION**

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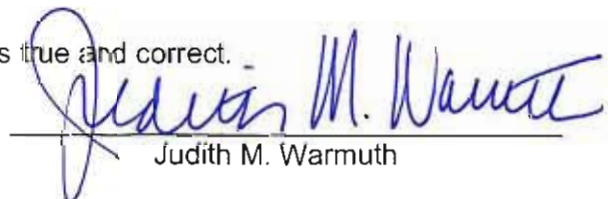
### **DECLARATION OF SERVICE**

I, Judith M. Warmuth, declare that on October 19, 2011, I deposited copies of the aforementioned document in the United States mail at 500 Capitol Mall, Suite 1600, Sacramento, California 95814, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

### **AND/OR**

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, Title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.

  
Judith M. Warmuth